

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

In re Application of) CC Docket No. 94-11
)
 TELEPHONE AND DATA SYSTEMS, INC.) File No. 10209-CL-P-715-B
) 88
 For Facilities in the Domestic)
 Public Cellular Telecommunications)
 Radio Service on Frequency Block B)
 in Market 715, Wisconsin 8)
 (Vernon), Rural Service Area)

To: The Honorable Joseph P. Gonzalez,
 Administrative Law Judge

RECEIVED
 JUN 21 1994
 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF SECRETARY

REPLY TO COMMENTS ON MOTION TO COMPEL DISCOVERY

GTE Mobilnet, Inc. and Portland Cellular Partnership, by counsel, request permission to Reply to TDS's and USCC's "Comments on Motion to Compel Discovery" ("Comments") filed June 15, 1994. It is unclear where TDS's and USCC's "Comments" fall in the authorized pleading cycle for discovery compulsion. Nevertheless, since TDS and USCC acknowledge that they are advancing new arguments, it is only fair to permit GTE Mobilnet, Inc. and Portland Cellular Partnership to respond briefly.

In their "Comments," TDS and USCC reiterate their position that Item 15 of the request for production of documents goes beyond the scope of permissible discovery. It does not. The materials requested by Item 15 are directly relevant to the issue whether USCC lacks the character qualifications to hold a cellular license in the New Orleans market. While the information concerns TDS's and USCC's behavior in other markets it is only sought as evidence of their character in this market. The Commission has made clear that it considers character relevant in judging an applicant's

No. of Copies rec'd
 List A B C D E

026

fitness for one particular market and it will look at evidence of the applicant's and its affiliates' behavior in other markets. See In Re Paging Network of Los Angeles, Inc., F.C.C. 93-130, released March 4, 1993 (finding violation of parent land mobile license applicant based on violations committed by subsidiary); In Re Catherine Waddill, 8 F.C.C. Rcd. 2169 released March 29, 1993, (looking to affiliate partnership's behavior in several different markets to find "willful and repeated" violations of ownership rules). This is not an indictment of ". . .USCC's general character qualifications," ("Comments," 2) but an inquiry into its character as it relates to USCC's fitness in this one market. GTE Mobilnet and Portland Cellular Partnership are not ". . .fish[ing] for evidence that would support additional issues." "Comments," 2, n.2. Rather, they are discovering additional evidence that relates to a central and original issue designated for hearing; USCC's character and fitness to operate a cellular system in Tammany parish.

TDS and USCC state that "only adjudicated violations are germane to character qualifications. . ." "Comments," 2. This statement is inaccurate. Regarding non-FCC misconduct that relates to an applicant's candor, the Commission requires ". . .licensees to report only adjudicated relevant misconduct. . ." In the Matter of Policy Regarding Character Qualification in Broadcasting Licensing (Policy Statement), 6 F.C.C. Rcd. 3448, 3449, released May 24, 1991. When dealing with violations of F.C.C. rules, however, the Commission has expressed no requirement of

adjudication. In In Re Catherine Waddill, 8 F.C.C. Rcd. 2169, released March 29, 1993, petitioner alleged violations of the F.C.C. alien ownership rules and misrepresentation to the Commission regarding ownership. Petitioner did not allege that adjudication of violation had occurred and the Commission did not require her to. Based upon its own analysis the Commission agreed that its rules had been violated in several markets. It is only in situations where the Commission is asked ". . . to resolve questions of state or federal law outside its principal area of jurisdiction. . ." that it prefers to look to an adjudication by a body more suited to judge the particular violation. Policy Statement, 6 F.C.C. Rcd. 3448, 3448-3449. The Commission is perfectly capable of and willing to determine whether a licensee has violated rules or policies of the F.C.C. and to judge whether such violations rise to the level of willful and repeated misconduct.

TDS and USCC cite no law to support their proposition that the ". . .scope of discovery in a hearing proceeding. . ." ("Comments," 2, n.2) does not embrace ". . .any matter,. . .relevant to the hearing issues, [that]. . .appears reasonably calculated to lead to the discovery of admissible evidence." 47 C.F.R. § 1.311(b). USCC's character is a hearing issue, and the materials requested by Item 15 are or will lead to admissible evidence.

Alternately, if TDS and USCC are willing to stipulate that they will make no claim that their conduct in the La Star proceeding was isolated, the need for this line of discovery would

be obviated. Neither the ALJ nor the other parties should be faced with a situation in which TDS and USCC are arguing mitigation of their misconduct on the basis that it was somehow an isolated incident without any test of that proposition having been made.

Respectfully submitted,

GTE Mobilnet, Inc.

by: 
Douglas B. McFadden



Donald J. Evans

R. Bradley Koerner
McFadden, Evans & Sill
1627 Eye Street, N.W.
Suite 810
Washington, D.C. 20006
(202) 293-0700

Its Attorneys

Respectfully submitted,

Portland Cellular Partnership

by: 
Michael B. Barr
Hunton and Williams
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20036
(202) 955-1515

Its Attorneys

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of)	CC Docket No. 94-11
)	
TELEPHONE AND DATA SYSTEMS, INC.)	File No. 10209-CL-P-715-B-
)	88
For Facilities in the Domestic)	
Public Cellular Telecommunications)	
Radio Service on Frequency Block B)	
in Market 715, Wisconsin 8)	
(Vernon), Rural Service Area)	

To: Hon. Joseph P. Gonzalez
Administrative Law Judge

COMMENTS ON
MOTION TO COMPEL DISCOVERY

Telephone and Data Systems, Inc. ("TDS") and United States Cellular Corporation ("USCC"), by their counsel, hereby request leave to file the following brief comments on the "Motion To Compel Discovery" filed June 15, 1994 (the "Motion") by GTE Mobilnet, Inc. ("GTE") and Portland Cellular Partnership ("PCP").^{1/}

The only issue designated in this case is whether USCC misrepresented or lacked candor in the La Star proceeding.

^{1/} These comments supplement the arguments made by TDS and USCC in their "Objection of Telephone and Data Systems, Inc. and United States Cellular Corporation to Request No. 15 of the Request for Production of Documents" served on June 6, 1994 (the "Objection"). The Motion advances an argument that differs somewhat from that made by counsel for the movants during the parties' negotiations over Document Request No. 15. Since the argument is somewhat different, we did not address it in our Objection. We therefore ask leave to address it with these brief comments now.

GTE/PCP contend that the requested documents are discoverable because they might lead to evidence of other violations by TDS/USCC, which would show a pattern of "willful and repeated" misconduct and would thus (say GTE/PCP) be relevant to TDS/USCC's general character qualifications. However, discovery beyond the designated issue(s) is not justified by a claim that evidence of other similar violations would "show a pattern of conduct" or willful and repeated misconduct. Friendly Broadcasting Co., 24 RR 2d 242, 246-47 (ALJ 1972) (discovery barred (i) regarding licensee's 1971 political broadcasts where designated issue only alleged violations re 1970 political broadcasts, and (ii) regarding violations at licensee's co-owned station not mentioned in designated issue).

Moreover, only adjudicated violations are germane to character qualifications, and there can be no adjudication unless the alleged violation first has been designated for hearing. As noted, the only issue designated here is whether USCC misrepresented or lacked candor in the La Star proceeding. There is simply no basis for the expanded discovery that GTE and PCP seek.^{2/}

^{2/} As the Commission has repeatedly made clear, discovery may not be used to fish for evidence that would support additional issues. Discovery Procedures, 11 FCC 2d 185, 187 (1968); Muncie Broadcasting Corp., 89 FCC 2d 123, 134 n. 6 (Rev. Bd. 1982); Fox Television Stations, Inc., 8 FCC Rcd 2361, 2441-43 (Rev. Bd. 1993). The cases cited by GTE/PCP at Motion p. 3 are wholly inapposite. None of them addresses the scope of discovery in a hearing proceeding; indeed, none even involved a hearing. See, (continued...)

GTE/PCP's theory converts every designated character issue into a sweeping examination of the licensee's "general" character qualifications, permitting an unlimited search for "other" misconduct in any case where only one violation has been alleged and designated for hearing. That is clearly beyond the proper bounds of discovery under Commission policy.

For these reasons, as well as the reasons stated in our Objection, GTE/PCP's motion should be denied.

Respectfully submitted,

TELEPHONE AND DATA SYSTEMS, INC.

By: Nathaniel F. Emmons
Nathaniel F. Emmons
Andrew H. Weissman

Mullin, Rhyno, Emmons and Topel, P.C.
1000 Connecticut Ave. - Suite 500
Washington, D.C. 20036-5383
(202) 659-4700

2/ (...continued)

Catherine L. Waddill, 8 FCC Rcd 2169 (1993) (notice of apparent liability for forfeiture); Paging Network of Los Angeles, Inc., 8 FCC Rcd 1702 (1993) (notice of apparent liability for forfeiture); RKO General, Inc. v. FCC, 670 F.2d 215 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982) (affirming in part and reversing in part disqualification of licensee without a hearing).

UNITED STATES CELLULAR CORPORATION

By: Mark D. Schneider
R. Clark Wadlow
Mark D. Schneider
Michael D. Warden

Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

June 15, 1994

CERTIFICATE OF SERVICE

I, Nathaniel F. Emmons, do hereby certify that on this 15th day of June, 1994, copies of the foregoing "Submission of 'Objection fo Telephone and Data Systems, Inc. and United State Cellular Corporation to Request No. 15 of the Request for Production of Documents" were sent by first class mail, postage prepaid, to the following:

* The Honorable Joseph P. Gonzalez
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W.--Room 221
Washington, D.C. 20554

* Joseph Paul Weber, Esq.
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.--Room 644
Mail Stop 1600D1
Washington, D.C. 20554

Kenneth E. Hardman, Esq.
Moir & Hardman
2000 L Street, N.W.
Suite 512
Washington, D.C. 20036

L. Andrew Tollin, Esq.
Luisa L. Lancetti, Esq.
Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, N.W.
Suite 600
Washington, D.C. 20006

Michael B. Barr, Esq.
Hunton & Williams
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

DOUGLAS B. MCFADDEN, ESQ.
DONALD J. EVANS, ESQ.
MCFADDEN, EVANS & SILL
1627 EYE STREET, N.W.--SUITE 810
WASHINGTON, D.C. 20006

HOWARD J. SYMONS, ESQ.
JAMES A. KIRKLAND, ESQ.
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY & POPEO, P.C.
701 PENNSYLVANIA AVENUE, N.W.
SUITE 900
WASHINGTON, D.C. 20004

WILLIAM H. CRISPIN, ESQ.
VERNER, LIIPFERT, BERNHARD, MCPHERSON & HAND
901 15TH STREET, N.W. -- SUITE 700
WASHINGTON, D.C. 20005


Nathaniel F. Emmons

* Hand Delivered

CERTIFICATE OF SERVICE

I, R. Bradley Koerner, do hereby certify that a true and correct copy of the foregoing document was served by First Class United States mail, postage prepaid, this 21 day of June, 1994, upon the following:

Joseph Weber
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 644
Washington, D.C. 20554

William H. Crispin
Verner Liipfert Bernhard
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005

Michael B. Bar
Hunton & Williams
2000 Pennsylvania Ave., N.W.
Suite 9000
Washington, D.C. 20036

Nathaniel F. Emmons
Mullin, Rhyne, Emmons & Topel
1000 Connecticut Ave.
Suite 500
Washington, D.C. 20036-5383

James A. Kirkland
Mintz, Levin, Cohn, Ferris,
Glovsky & Popeo
701 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004

Luisa Lancetti
Wilkinson, Barker, Knauer &
Quinn
1735 New York Avenue, N.W.
Washington, D.C. 20006

Kenneth E. Hardman
Moir & Hardman
2000 L. Street, N.W.
Suite 512
Washington, D.C. 20036

R. Clark Wadlow
Sidley Austin
1722 Eye Street, N.W.
Washington, D.C. 20006



R. Bradley Koerner